

United States District Court  
For the Northern District of California

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7 WAYNE JEROME ROBERTSON,  
8 Plaintiff,  
9 vs.  
10 OFFICER R. CUSACK,  
11 Defendant.

12 No. C 03-3496 MEJ  
13  
**ORDER GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE FIRST  
AMENDED COMPLAINT**

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17 **I. INTRODUCTION**

18 Plaintiff Wayne Jerome Robertson ("Plaintiff"), an inmate at Pelican Bay State Prison, filed a  
19 *pro se* complaint against correctional officer Rolf Cusack ("Officer Cusack") for violation of 42  
20 U.S.C. § 1983, pertaining to physical injuries he claims to have sustained after allegedly being  
21 attacked by two inmates on January 12, 2003. On February 3, 2006, Plaintiff brought a Motion for  
22 Leave to File a First Amended Complaint ("Motion").

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24 **II. BACKGROUND**

25 On January 12, 2003, Plaintiff was allegedly attacked by two inmates while walking from his  
26 assigned cell to the prison medical clinic to receive medication. *See* Motion at 3 and Declaration of  
27 Esther L. Klisura in Support of Plaintiff's Motion for Leave to File First Amended Complaint  
28 ("Declaration"), Exhibit A at 1-2. At the time of the attack, Officer Cusack was working the control

1 booth of Plaintiff's housing unit. First Amended Complaint for Damages ("Proposed Complaint") at  
2 ¶ 8. During this time, the prison was on lock-down status and under modified program (*id.*), which  
3 meant that only one prisoner was allowed to be out of their cell at a time and inmates visiting the  
4 medical clinic or psychiatric services were to be escorted in restraints. Declaration, Exhibit A at 7.

5 Plaintiff was let out of his cell by Officer Cusack without restraints or an escort and on his  
6 way to the medical clinic allegedly noticed two inmates standing in front of their cell door, which  
7 was open. Declaration, Exhibit A at 1-2. Plaintiff states he heard one of the inmates say "get him"  
8 and alleges the two inmates attacked him, one stabbing him four times with a homemade instrument  
9 (in the back and neck) and the other hitting his head and upper body with a closed fist. *Id.*

10 On July 28, 2003, Plaintiff filed a *pro se* complaint under 42 U.S.C. § 1983 for the injuries he  
11 claims to have sustained during the January 12, 2003 incident, asserting a single cause of action and  
12 naming one defendant, Officer Cusack. Declaration at ¶ 2. On December 7, 2005, the Honorable  
13 Saundra Brown Armstrong appointed counsel for Plaintiff and at the same time, ordered a four-week  
14 stay of the action, which was lifted January 4, 2006. Declaration at ¶ 3.

15 On January 24, 2006, the parties voluntarily consented to magistrate jurisdiction and the case  
16 was reassigned to Magistrate Judge Maria-Elena James.

17 On February 2, 2006, Plaintiff filed a Motion for Leave to File First Amended Complaint, as  
18 well as the Declaration of Esther L. Klisura in support thereof. Officer Cusack filed an Opposition  
19 on February 16, 2006, and Plaintiff filed a Reply on March 2, 2006.

### 20 III. DISCUSSION

21 Plaintiff seeks to add causes of action for negligence and negligence *per se*, and one  
22 additional defendant, Joseph McGrath, the warden at Pelican Bay State Prison at the time of the  
23 incident.<sup>1</sup> Plaintiff asserts that his proposed amended complaint relates back to the original  
24 complaint and that he has acted diligently to file this motion for leave as soon as was practicable. In  
25 addition, Plaintiff argues there is no bad faith or dilatory motive in seeking to file the amended

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26 <sup>1</sup> Officer Cusack does not oppose Plaintiff's new negligence causes of action; therefore, the Court need only  
27 address whether Plaintiff should be permitted to add defendant Warden McGrath.

1 complaint and Officer Cusack will not be unduly prejudiced by it.

2 In response, Officer Cusack argues that Plaintiff's amended complaint is futile as to the new  
3 defendant, Warden McGrath, since Plaintiff never exhausted administrative remedies as to Warden  
4 McGrath. In addition, Officer Cusack argues that this Court should grant his motion for summary  
5 judgment, which he states is pending and has gone unopposed since the date it was filed on July 18,  
6 2005.

7 In his Reply, Plaintiff asserts that leave to amend will not be futile due to non-exhaustion of  
8 administrative remedies since a plaintiff's exhaustion of administrative remedies is not a pleading  
9 requirement. Plaintiff argues that non-exhaustion of administrative remedies is a defense that a  
10 defendant has the burden of raising and proving and, here, Officer Cusack has not met the burden.  
11 In addition, Plaintiff asserts that there is no pending motion for summary judgment since Judge  
12 Armstrong denied Officer Cusack's motion for summary judgment without prejudice on October, 25,  
13 2005. Plaintiff further provides that Officer Cusack has not yet renewed the motion and no  
14 opposition is due; therefore, no motion is currently pending.

15 **A. Legal Standard**

16 Federal Rule of Civil Procedure 15(a) provides that once a responsive pleading has been  
17 filed, a party may amend his/her pleading only by leave of court or by written consent of the adverse  
18 party and leave shall be freely given when justice so requires. The Ninth Circuit has held that Rule  
19 15's policy of favoring amendments to pleadings should be applied with "extreme liberality." *DCD*  
20 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *U.S. v. Webb*, 655 F.2d 977,  
21 979 (9th Cir. 1981)). That is, leave to amend should be freely given unless the court finds undue  
22 delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party,  
23 or futility of the amendment. *DCD Programs*, 833 F.2d at 186; *see also Foman v. Davis*, 371 U.S.  
24 178, 182 (1962). Any determination regarding a request for leave to amend should be guided by the  
25 underlying purpose of Rule 15 - to facilitate a decision on the merits, rather than on the pleadings or  
26 technicalities. *Webb*, 655 F.2d at 979.

27 Pleading requirements are especially liberal as to *pro se* pleadings. *Haines v. Kerner*, 404

1 U.S. 519, 520 (1972) (pleadings filed by *pro se* litigants are held to less rigid standards than those  
2 drafted by attorneys). In such cases, the duty to construe the pleadings liberally is particularly  
3 applicable. *Zichko v. Idaho*, 247 F.3d 1015, 1020 (9th Cir. 2001).

4 **B. Application to Case at Bar**

5 Here, Officer Cusack directs the Court's attention to Plaintiff's addition of Warden McGrath  
6 and argues that Plaintiff has not exhausted his administrative remedies as to Warden McGrath; thus,  
7 leave to amend would be futile. Defendant Cusack's Opposition to Plaintiff's Motion to Amend  
8 ("Opposition") at 1. If an amendment to a complaint will not at all affect the outcome of a lawsuit,  
9 leave to amend is futile and should be denied. *Klamath-Lake Pharm. Ass'n v. Klamath Med.*, 701  
10 F.2d 1276, 1293 (9th Cir. 1983). Leave to amend should also be denied as futile if it is clear to the  
11 court that a plaintiff will not prevail on the merits of the amendment. *Smith v. Commanding Officer,*  
12 *Airforce Accounting and Fin. Ctr.*, 555 F.2d 234, 235 (9th Cir. 1977).

13 Here, the Court finds that adding Warden McGrath as a defendant could substantially affect  
14 the outcome of the lawsuit. At the outset, the amendment would charge both Officer Cusack and  
15 Warden McGrath with civil rights and negligence violations, thus affecting the case's outcome.  
16 Accordingly, the Court finds that leave to amend is not futile. *Klamath-Lake*, 701 F.2d at 1293.

17 In addition, it is not clear that Plaintiff will not succeed on the merits of his claims against  
18 Warden McGrath because the record does not conclusively show Plaintiff's non-exhaustion of  
19 administrative remedies. 42 U.S.C. § 1997e(a) imposes a requirement that no action shall be  
20 brought with respect to prison conditions under § 1983 until administrative remedies are exhausted.  
21 Although plaintiffs are required to exhaust administrative remedies, § 1997e(a) does not impose a  
22 pleading requirement. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Instead, § 1997e(a)  
23 creates a defense, whereby defendants have the burden of raising and proving the absence of  
24 exhaustion. *Id.* Because Warden McGrath is not yet a party, there has been no opportunity for him  
25 to assert this defense. As such, the Court cannot conclusively determine at this time whether  
26 Plaintiff will prevail on his claims against Warden McGrath. In light of Rule 15's liberal application  
27 to pleadings filed by *pro se* litigants and the Court's finding that leave to amend would not be futile,

1 the Court finds that Plaintiff's motion should be granted.

2 Officer Cusack also argues that this Court should grant his motion for summary judgment,  
3 which he states is pending and has gone unopposed since the date it was filed on July 18, 2005.  
4 However, on October 25, 2005, Judge Armstrong denied Officer Cusack's motion for summary  
5 judgment without prejudice to renewing it after an attorney was appointed to represent Plaintiff.  
6 Order Referring Case to Federal Pro Bono Project and Addressing Pending Motions, p. 3. As  
7 Officer Cusack has not renewed the motion, there is no motion for summary judgment currently  
8 pending.

9 **IV. CONCLUSION**

10 Based on the foregoing analysis, the Court hereby GRANTS Plaintiff's Motion for Leave to  
11 File a First Amended Complaint. Within five (5) days from the date of this Order, Plaintiff shall file  
12 his amended complaint. Defendants shall file a responsive pleading within 30 days from the date of  
13 Plaintiff's filing. At that time, Warden McGrath shall also file his consent to or declination of  
14 magistrate jurisdiction.

15 **IT IS SO ORDERED.**

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17 Dated: April 4, 2006  
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19 MARIA-ELENA JAMES  
20 United States Magistrate Judge  
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